Autron Sdn Bhd v Goh Eng Hwa Construction

HIGH COURT (MELAKA) — CIVIL SUIT NOS 12–18 & 19 OF 1997
AUGUSTINE PAUL JC
22 AUGUST 1997

Civil Procedure *— Affidavit — Affidavit-in-reply — Affidavit-in-reply to application for summary judgment — Time for filing and service of — Whether requirement of filing and serving affidavit-in-reply to an application for summary judgment under O 14 of the Rules of the High Court 1980 within 14 days applies with equal force to that under O 26A of the Subordinate Courts Rules 1980 — Subordinate Courts Rules 1980 O 26A r 4(1)*

The plaintiff had commenced proceedings against the defendant for the recovery of RM70,000 arising from a building contract entered into between them. The defence dated 12 September 1995 was subsequently filed and served. By its application dated 12 December 1996, the plaintiff applied for summary judgment against the defendant in accordance with the provisions of O 26A of the Subordinate Courts Rules 1980 ('the SCR'), supported by the affidavit of a partner in the plaintiff firm. The application and affidavit were served on the defendant on 20 January 1997. It was fixed for hearing on 2 May 1997. Wong Sen Chiew ('Wong'), a director of the defendant affirmed an affidavit-in-reply on 3 February 1997, which was duly filed and served on the plaintiff on 4 February 1997, ie on the 15th day after receipt of the plaintiff's affidavit which led the defendant to believe that it was out of time in filing and serving its affidavit. The defendant then filed an application dated 15 February 1997 praying for, inter alia, an order for extension of time to file the affidavit-in-reply of Wong, supported by an affidavit affirmed by Wong on 12 February 1997. The application was dismissed by the sessions court judge who then proceeded to allow the plaintiff's application for summary judgment. The defendant appealed against both orders. The issue that arose for consideration in these appeals was the time limit within which a defendant must file his affidavit-in-reply to an application for summary judgment filed against him under O 26A of the SCR.

Held, allowing both appeals:

(1) With regard to proceedings for summary judgment under O 26A of the SCR, r 4(1) states in crystalline terms that a defendant may show cause by affidavit or otherwise '... not less than 4 clear days before the date of hearing ... '.

It therefore followed that the enactment of r 4(1), a specific provision, precluded the application of O 24 r 4(2)(b) of the SCR to proceedings for summary judgment under O 26A of the SCR. In any event, O 24 r 4 of the SCR could not apply to O 26A of the SCR as the former was restricted in its application to chamber matters while r 3(1) of O 26A of the SCR stated in

plain terms that the hearing for summary judgment must be in open court. Consequently, it was sufficient for an affidavit-in-reply to be filed and served not less than four clear days before the date of hearing of the application for summary judgment under O 26A of the SCR (see p 419G–I); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 distinguished.

(2) In this case, the application for summary judgment had been fixed for hearing on 2 May 1997. The affidavit-in-reply of the defendant was filed and served on 4 February 1997, ie well before the required four-day period. The defendant had therefore complied with the requirements of O 26A of the SCR without realizing it. Consequently, the application of the defendant for the extension of time was unnecessary and the learned sessions court judge ought to have made no order on it. As the application for summary judgment was allowed after having wrongly excluded the affidavit-in-reply, the order made was irregular (see p 420A–C).

[Bahasa Malaysia summary

Plaintif telah memulakan prosiding terhadap defendan untuk mendapat kembali RM70,000 yang timbul daripada suatu kontrak pembangunan yang diikat di antara mereka. Pembelaan bertarikh 12 September 1995 kemudiannya difailkan dan disampaikan. Menerusi permohonannya bertarikh 12 Disember 1996, plaintif memohon untuk penghakiman terus terhadap defendan menurut peruntukan A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), disokong oleh afidavit seorang rakan dalam firma plaintif. Permohonan dan afidavit disampaikan kepada defendan pada 20 Januari 1997. Ia ditetapkan untuk pembicaraan pada 2 Mei 1997. Wong Sen Chiew ('Wong'), seorang pengarah defendan mengikrarkan suatu afidavit jawapan pada 3 Februari 1997, yang difailkan dan disampaikan kepada plaintif pada 4 Februari 1997, iaitu pada hari ke-15 selepas penerimaan afidavit plaintif yang menyebabkan defendan percaya bahawa ia luar masa dalam memfailkan dan menyampaikan afidavitnya. Defendan kemudiannya memfailkan suatu permohonan bertarikh 15 Februari 1997 yang memohon, antara lain, perintah untuk pelanjutan masa bagi memfailkan afidavit jawapan Wong, disokong oleh afidavit yang disahkan oleh Wong pada 12 Februari 1997. Permohonan tersebut ditolak oleh hakim mahkamah sesyen yang kemudiannya terus membenarkan permohonan plaintif untuk penghakiman terus. Defendan merayu terhadap kedua-dua perintah. Isu yang timbul untuk pertimbangan dalam rayuan-rayuan ini adalah had masa dalam mana seseorang defendan mesti memfailkan afidavit jawapannya kepada permohonan untuk penghakiman terus yang difailkan terhadapnya di bawah A 26A KMR.

Diputuskan, membenarkan kedua-dua rayuan:

(1) Berkenaan dengan prosiding untuk penghakiman terus di bawah A 26A KMR, k 4(1) menyatakan dalam terma yang jelas bahawa

seseorang defendan boleh menunjukkan alasan melalui afidavit atau sebaliknya '... tidak kurang daripada 4 hari genap sebelum tarikh pembicaraan ... '.

Oleh yang demikian, ia bermakna bahawa penggubalan k 4(1), suatu peruntukan yang khusus, mengecualikan pemakaian A 24 k 4(2)(b) KMR kepada prosiding untuk penghakiman terus di bawah A 26A KMR. Walau bagaimanapun, A 24 k 4 KMR tidak terpakai kepada A 26A KMR kerana A 24 k 4 adalah terhad dalam pemakaian kepada perkara kamar manakala A 26A k 3(1) KMR menyatakan dalam terma jelas bahawa pembicaraan untuk penghakiman terus mestilah berlangsung di mahkamah terbuka. Dengan itu, adalah memadai untuk suatu afidavit jawapan difailkan dan disampaikan tidak kurang daripada empat hari genap sebelum tarikh pembicaraan permohonan untuk penghakiman terus di bawah A 26A KMR (lihat ms 419G–I); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 dibeza.

(2) Dalam kes ini, permohonan untuk penghakiman terus telah ditetapkan untuk pembicaraan pada 2 Mei 1997. Afidavit jawapan defendan difailkan dan disampaikan pada 4 Februari 1997, iaitu jauh sebelum tempoh empat hari yang dikehendaki. Oleh itu, defendan telah mematuhi keperluan A 26A KMR tanpa menyedarinya. Dengan itu, permohonan defendan untuk pelanjutan masa adalah tidak perlu dan hakim mahkamah sesyen yang arif tidak sepatutnya membuat sebarang perintah atasnya. Oleh kerana permohonan untuk penghakiman terus dibenarkan selepas afidavit jawapan dengan salahnya dikecualikan, perintah yang dibuat adalah luar aturan (lihat ms 420A–C).]

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Case referred to

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (distd)

Legislation referred to

Rules of the High Court 1980 O 14, O 32 rr 13, 13(2)(b)
Subordinate Courts Rules 1980 O 24 rr 4, 4(2)(b), O 26A r 4(1)

Ee Lai Ching (*Stanley Chang & Partners*) for the appellant.
Azad Bashir bin Abdul Kariem Bashir (*Bashir & Co*) for the respondent.

Augustine Paul JC: The short but significant issue that arose for consideration in these appeals was the time limit within which a defendant must file his affidavit-in-reply to an application for summary judgment

A filed against him under O 26A of the Subordinate Courts Rules 1980 ('the SCR').

The plaintiff by its summons dated 19 June 1995 commenced proceedings against the defendant for the recovery of RM70,000 arising from a building contract entered into between them. The defence dated
B 12 September 1995 was subsequently filed and served. By its application dated 12 December 1996, the plaintiff applied for summary judgment against the defendant in accordance with the provisions of O 26A of the SCR. The application was supported by the affidavit of Goh Sing Bing, a partner in the plaintiff firm. The application and affidavit were served on the defendant on 20 January 1997. It was fixed for hearing on 2 May 1997.
C Wong Sen Chiew ('Wong'), a director of the defendant, affirmed an affidavit-in-reply on 3 February 1997 and it was duly filed and served on the plaintiff on 4 February 1997. It will therefore be noticed that the defendant's affidavit was filed and served on the plaintiff on the 15th day after receipt of the latter's affidavit. This led the defendant to believe that
D it was out of time in filing and serving its affidavit. By its application dated 15 February 1997 the defendant accordingly filed an application praying for, inter alia, an order for extension of time to file the said affidavit-in-reply of Wong. This application was supported by an affidavit affirmed by Wong on 12 February 1997. The material parts of the affidavit read as follows:

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> 7 Saya memohon keizinan mahkamah yang mulia ini untuk merujuk kepada afidavit jawapan tersebut di mana afidavit jawapan tersebut difailkan di luar jangkamasa yang ditetapkan mengikut A 24 k 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980.
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> 8 Saya dengan rendah diri memohon keizinan memfailkan afidavit jawapan
F tersebut di luar jangkamasa. Kelewatan satu hari tersebut adalah tidak disengajakan dan disebabkan oleh kesukaran pihak defendan untuk mendapatkan dokumen-dokumen dan maklumat bagi tujuan menjawab dakwaan-dakwaan serta isu-isu yang dinyatakan oleh pihak plaintif memandangkan dokumen-dokumen dan maklumat yang diperlukan adalah berkaitan dengan kejadian yang berlaku pada tahun 1993.

G The affidavit reveals that the defendant felt that it was out of time by one day in filing the affidavit-in-reply purportedly pursuant to O 24 r 4(2)(b) of the SCR. This application was heard and dismissed with costs by the learned sessions court judge on 2 May 1997. The application for summary judgment which was heard on 2 May 1997 was allowed with costs on
H 16 May 1997 by the learned sessions court judge in the absence of the affidavit-in-reply of the defendant as it had been excluded. The defendant appealed against both these orders.

I heard the two appeals together on 21 August 1997. In their respective submissions, both the learned counsel contended before me that a
I defendant's affidavit-in-reply to an application for summary judgment under O 26A of the SCR must be filed and served on the other party within 14 days from the date on which the affidavit he intends to reply was served on him. They said that this is the result of reading O 26A with O 24

r 4(2)(b) of the SCR. I shall reproduce the whole of r 4 of O 24 of the SCR. It reads as follows:

> 4 (1) Any party
> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so.
>
> (2) Except as otherwise provided by these rules —
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
> (b) a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

In support of their argument, they said — and which is true — that O 24 r 4 of the SCR is in pari materia with O 32 r 13 of the Rules of the High Court 1980 ('the RHC'). They then referred to *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 (per Siti Norma Yaakob, Abdul Malek Ahmad and Mokhtar Sidin JJCA) where the Court of Appeal considered the applicability of O 32 r 13(2)(b) of the RHC to O 14 of the RHC, equivalent to O 26A of the SCR. Siti Norma Yaakob JCA in an articulate expression of the court said at pp 92–93:

> In proceedings for summary judgment under O 14 r 2 thereof prescribes the manner in which the application for summary judgment is to be made with the following provisions:
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> 2 (1) An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part as the case may be, or no defence except as to the amount of any damages claimed.
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> (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
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> (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.
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> A defendant intending to object to such an application may do so pursuant to the provisions of r 4(1) and (2) which state as follows:
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> 4 (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.
>
> (2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.

A closer reading of r 2(3) and r 4(1) reveals that in the case of the affidavit in support, there is a time frame mentioned when such an affidavit is to be served on the defendant. Rule 2(3) specifies it to be four clear days before the return date. We do not find any corresponding time frame mentioned in r 4 or any other rule when the affidavit in reply should be filed and served other than stating that a defendant may show cause against the application by way of an affidavit in reply at sub-r (1). The rule is silent as to when such an affidavit in reply is to be filed and served on the plaintiff. It is to fill this lacuna in the procedure that O 32 r 13(2)(b) can be relied upon to fill in the gap. The defendant has 14 days from the time he received the affidavit in support within which to reply. To that end, we consider that the provisions of r 13(2)(b) are applicable in proceedings for summary judgment under O 14 and we confirm the finding reached in the *Wing Tiek Holdings Bhd* case to have correctly stated the law on the procedure to be followed in O 14 proceedings vis-a-vis the applicability of O 32 r 13(2)(b) to such proceedings.

Both the learned counsel took the common stand that the pronouncement by the Court of Appeal on the need to file and serve an affidavit in reply to an application for summary judgment under O 14 of the RHC within a period of 14 days by virtue of O 32 r 13(2)(b) of the RHC applies with equal force to applications for summary judgment under O 26A of the SCR pursuant to the equivalent provision in the SCR, that is to say, O 24 r 4(2)(b).

In order to avoid any further misapprehension of the sagacious words of *Pua Lai Ong* and the relevant rules of the SCR and the RHC, I invited both counsel to have a close and careful look at O 26A r 4(1) of the SCR which is in the following terms:

> 4 (1) A defendant may *not less than 4 clear days* before the date of a hearing show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court. (Emphasis added.)

I interpolate to add that in *Pua Lai Ong*, the Court of Appeal extended the 14-day period prescribed by O 32 r 13(2)(b) of the RHC to proceedings for summary judgment under O 14 of the RHC for the simple reason that no time frame has been specified in the latter for the filing and service of the affidavit-in-reply. However, with regard to proceedings for summary judgment under O 26A of the SCR, r 4(1) which I have reproduced earlier states in crystalline terms that a defendant may show cause by affidavit or otherwise '... not less than 4 clear days before the date of hearing ... .' It therefore follows that the enactment of the specific provision precludes the application of O 24 r 4(2)(b) of the SCR to proceedings for summary judgment under O 26A of the SCR. In any event, O 24 r 4 of the SCR cannot apply to O 26A of the SCR as the former is restricted in its application to chamber matters while r 3(1) of O 26A of the SCR states in plain terms that the hearing for summary judgment must be in open court. In the premises, it is sufficient for an affidavit-in-reply to be filed and served not less than four clear days before the date of hearing of the application for summary judgment under O 26A of the SCR.

In the appeals before me, the application for summary judgment had been fixed for hearing on 2 May 1997. The affidavit-in-reply of the defendant was filed and served on 4 February 1997 — well before the required four-day period. The defendant had therefore complied with the requirements of O 26A of the SCR without realizing it. In the premises, the application of the defendant for the extension of time was unnecessary and the learned sessions court judge ought to have made no order on it. As the application for summary judgment was allowed after having wrongly excluded the affidavit-in-reply, the order made is irregular. In the upshot, I allowed both the appeals and ordered that the application for summary judgment be reheard. At the request of both parties, I gave them leave to file further affidavits if necessary. I made no order as to costs for reasons which are transparent.

Appeals allowed.

Reported by Koay Sook Kuan